MOGAN PALANIANDY v. LEMBAGA PENCEGAHAN JENAYAH MALAYSIA & ORS

HIGH COURT MALAYA, GEORGETOWN
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL APPLICATION NO: 44-01-01-2016]
19 AUGUST 2016

CRIMINAL PROCEDURE: *Habeas corpus – Detention – Applicant arrested pursuant to s. 3(1) of Prevention of Crime Act 1959 – Applicant issued with detention order for two years – Whether procedure for detention regular and in order – Whether relevant laws and regulations complied with – Criminal Procedure Code, Chapter XXXVI – Prevention of Crime (Advisory Board Procedure) Regulations 2014*

The applicant was arrested pursuant to s. 3(1) of the Prevention of Crime Act 1959 ('the Act') and a remand order was obtained against him for a period of 21 days. The applicant had requested to the Prevention of Crime Board ('the Board') for a review of the finding made against him by the inquiry officer ('the IO'). The Board confirmed the finding of the IO and the applicant's name was subsequently registered in the Register by the Registrar of Criminals ('the Registrar'). The Board further concluded that the applicant was within the category of registrable persons under para 5, Part 1, First Schedule of the Act. The applicant was issued with a detention order for a duration of two years. Hence, the present application. In support of his application for *habeas corpus* under Chapter XXXVI of the Criminal Procedure Code ('the CPC') against the detention order, the applicant argued that the respondent failed to comply with (i) sub-r. 5(1) of the Prevention of Crime (Advisory Board Procedure) Regulations 2014 ('the Regulations') as (a) there was failure to prove service of Form 2 by the Chairman; and (b) there were two contradicting sets of Form 2; (ii) sub-r. 11(1) of the Regulations and art. 151(1)(b) of the Federal Constitution as a person could not be detained beyond three months from the date of the receipt of representations by the Board and the said Board must hear the representations of the detainee and send its recommendations to the Yang di-Pertuan Agong ('YDPA') within that period; (iii) s. 12(1) of the Act due to the failure of the IO to report to the Registrar that there were reasonable grounds for believing that the applicant was a member of any registrable categories; (iv) s. 11(2) of the Act following the non-disclosure of the identity of the law officer and the absence of anything to show that the Board requested for his or her advice before confirming the findings of the IO; and (v) s. 10(3) and (4) of the Act since the applicant was not served with the decision of the Board.

Held (dismissing application):

(1) There was no necessity for the Chairman to effect service. The requirement of sub-r. 5(1) of the Regulations was effective as long as Form 2 was served upon the applicant even if not by the Chairman

himself. The reason there appeared two sets of Form 2 was because one set was issued by the Advisory Board and sent to the detention centre to be served on the applicant while the other showed the copy already received by the applicant. Obviously, the former document would not contain any proof of service while the latter did. Therefore, there was no ambiguity or contradiction. (paras 17-120)

(2) The three months period does not commence from the date of the detention. Instead, it commences from the date of receipt of Form 1 until it is sent to the YDPA. There is no further stipulation as to when the YDPA has to consider the recommendation of the Board. There is no necessity under the law for the respondents to state what were the findings or instructions of the YDPA in relation to the recommendation put up by the Board. (paras 34 & 35)

(3) The phrase 'reported' under s. 12(1) of the Act refers to a full report sent by the IO to the Board in accordance with s. 10(2) of the same Act. The Registrar is required to register the name of a person who is reported by the IO to the Board. This was in accord with the wordings in s. 12(1)(b) of the Act as the registration of the person could only be done after taking into account whether such person had chosen to avail himself of the right to a review. The applicant had requested for a review and the Board conducted one. Therefore, it was only the Board that possessed the necessary information and it was the only logical party that could have divulged such information in its report which had confirmed the findings of the IO to the Registrar. (paras 45-47)

(4) There is nothing in s. 10(2) of the Act that appears to define the expression 'law officer'. There is also nothing that indicates that the identity and qualifications of the law officer needs to be disclosed. (para 55)

(5) Upon plain reading and its ordinary sense, the wordings 'Whenever the Board, after considering the finding of the Inquiry Officer submitted under subsection (1), is satisfied …' employed in the opening of s. 10(3) of the Act, envisages a situation where there is a negative finding under sub-s. (1) and not a situation under sub-s. (2) which related to a positive finding from the very commencement, made by the IO. In that situation, s. 10(4) has no application. The provisions of sub-s. 3(b) and (4) only applies in a situation where the Board converts a negative finding to a positive finding. This was obviously not the case here. (paras 81-82)

Case(s) referred to:

Abdul Razak Baharudin & Ors v. Ketua Polis Negara & Ors And Another Appeal [2005] 4 CLJ 445 FC ***(refd)***

Chow Mi Choi v. Pengerusi Lembaga Pencegahan Jenayah & Ors [2016] 1 MLRH 586 ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Mohamad Alif Salim lwn. Pengerusi, Lembaga Pencegahan Jenayah & Yang Lain [2015] 1 LNS 1346 HC ***(refd)***
Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613 FC ***(refd)***
Mugilan Monyarasu lwn. Menteri Dalam Negeri, Malaysia & Yang Lain [2016] 1 CLJ 1026 HC ***(refd)***
Teow Leong Wooi lwn. Menteri Dalam Negeri, Malaysia & Yang Lain [2015] 1 LNS 1213 HC ***(refd)***
Tirthadeva Sivan Premkumar v. Pengerusi Lembaga Pencegahan Jenayah Malaysia & Ors [2016] 5 CLJ 1007 HC ***(refd)***

Legislation referred to:
Federal Constitution, art. 151(1)(b)
Prevention of Crime (Advisory Board Procedure) Regulations 2014, regs. 5(1), 11(1)
Prevention of Crime Act 1959, ss. 3(1), 4(1)(a), 9, 10(2), (3)(a), (b), (4), 11(1), (2)(a), 12(1)(a), (b), 15A, 19(1), 21A

For the appellant - Naizatul Zamrina Karizaman; M/s KL Chee & Co
For the prosecution - Munirah Muhamed Padzil; DPP

Reported by Najib Tamby

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] The applicant abovenamed brought an action for *habeas corpus* in accordance with Chapter XXXVI Criminal Procedure Code (Act 593) in respect of a detention order made against him for a duration of two years commencing on 2 July 2015 at the Special Rehabilitation Centre "Pusat Permulihan Khas" at Pokok Sena in Kedah.

Facts And Chronology Of Events

[2] The relevant facts and chronology of events surrounding the detention of the applicant are set out as follows. The applicant abovenamed was arrested under s. 3(1) of the Prevention of Crime Act 1959 ("the Act") on 21 May 2015 at Kuala Lumpur. On 22 May 2015, a remand order under s. 4(1)(a) of the Act was obtained against him for a period of 21 days effective until 11 June 2015.

[3] On 16 June 2015, an inquiry was held at which several witnesses were present, by the inquiry officer ("IO") pursuant to s. 9 of the Act. On 19 June 2015, the IO prepared a finding as required by s. 10 of the Act. On 26 June 2015, the IO submitted a complete report in writing together with a copy of his finding under s. 10(2) of the Act to the Prevention of Crime Board ("the Board").

[4] On 23 June 2015, the Board received a copy of Form I under s. 11(1) of the Act informing that the applicant intended to request the Board to review the finding or decision against the applicant.

[5] On 1 July 2015, at 1.30pm, the Board met regarding the finding of the IO and after consideration, decided to confirm the finding of the IO under s. 10(2) of the Act. On 1 July 2015, the name of the applicant was registered in the Register by the Registrar of Criminals ("Registrar").

[6] On 2 July 2015, the Board met and concluded that the applicant was within the category of registrable persons under para. 5, Part 1, First Schedule of the Act. Following this, the Board issued a detention order for a duration of two years commencing 2 July 2015 at the Special Rehabilitation Centre "Pusat Permulihan Khas" at Pokok Sena in Kedah under s. 19(1) of the Act.

Applicable Law

[7] The powers of the court when hearing an application for *habeas corpus* is circumscribed by s. 15A of the Prevention of Crime Act 1959 as follows:

> 15A. Judicial review of act or decision of Board
>
> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, **except in regard to any question on compliance with any procedural requirement in this Act** governing such act or decision.
>
> (2) In this Act, "judicial review" includes proceedings instituted by way of:
>
> (a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;
>
> (b) an application for a declaration or an injunction;
>
> (ba) **a writ of *habeas corpus***; and
>
> (c) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Board in accordance with this Act. (emphasis added)

[8] In *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914, it was held:

> In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a *habeas corpus* application where the detention order of the Minister made under s. 4(1) of the Ordinance or, for that matter, the equivalent ss. in ISA 1960 and DD(SPM) Act 1985, *the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law*

or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance. (emphasis added)

[9] This decision was followed in *Abdul Razak Baharudin & Ors v. Ketua Polis Negara & Ors And Another Appeal* [2005] 4 CLJ 445.

[10] The parameters of the court in applications of this nature were also set out in *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613, as follows:

The general rule that a writ of habeas corpus must be directed against the current order of detention therefore applies where a detention under s. 6(1) has been made subsequent to an arrest and detention under s. 3(1) and (2). It follows that where a detention order has been made under s. 6(1) the writ of habeas corpus must be directed only against that order even if the earlier arrest and detention are irregular. This view is supported by *Barnardo v. Ford* [1892] AC 326 where Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. Thus any irregularity in a detention order made under s. 3(2) when it has been superseded by one under s. 6(1) is not a relevant matter for consideration. In this regard *The Law of Habeas Corpus*, 2nd edn, by RJ Sharpe says at p 179:

> It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took effect will be relevant to the issue before the court, unless by reason of some special consideration arising from the particular proceedings.

And at p. 186:

> On the present state of the law, in almost every instance, the relevant time at which the detention is to be justified is the time at which the court considers the case. Prior illegality will not be relevant unless by reason of some special rule derived from the particular nature of the proceedings involved.

Therefore a prior illegality which has ceased cannot be the subject matter of inquiry. That would also be the conclusion in the case of a detention order made under s. 8(1) of the Internal Security Act 1960 and s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 subsequent to an arrest and detention made under both the statutes. It is perhaps appropriate to refer to *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81 where it was held that an order of detention made

> under s. 8(1) of the Internal Security Act 1960 is not tainted by an illegality or irregularity in the s. 73 detention. However, the conclusion was reached not on the rationale as discussed in this judgment but on the principles enunciated in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129. Such an approach would leave unanswered the effect of procedural irregularities in an earlier detention which has been superseded by another detention order. Be that as it may, that case made it clear that a court has no jurisdiction to hear a writ filed against the police for irregularities in a detention order under s. 73(1) of the Internal Security Act 1960 when it had been superseded by one under s. 8(1) thereby bringing into sharp focus the propriety of the judgment of this court in *Mohamed Ezam Mohd Noor v. Ketua Polis Negara & Ors* [2002] 4 CLJ 309. The rationale underlying this judgment would, with respect, render the stand taken in the latter case unsustainable in law. (emphasis added)

It is thus clear that the court is not to look to the substance or merits of the decision made but it must confine itself to the issue of whether there has been a breach of any procedural requirements in the relevant legislation.

Grounds Of Challenge Raised And Findings Of This Court

[11] The applicant raised several grounds of challenge to the detention order against him as follows:

(a) Failure to comply with sub-reg. 5(1) Prevention of Crime (Advisory Board Procedure) Regulations 2014

Sub-reg. 5(1) of the said Regulations read:

> 5. Hearing of representations
>
> (1) Whenever any representations are received by the Secretary, the Chairman shall appoint a time and place for the hearing of the representations by the Advisory Board and shall cause a notice in Form 2 of the Schedule to be served on the detained person.

[12] In support the applicant alluded to Form 2 in this case, which is the relevant form under sub-reg. 5(1), and submitted that there was failure to prove service of the said Form 2 upon the applicant. It was submitted that based upon Form 2 exhibited as "AEM-2" in the affidavit filed, the signature column was left empty meaning that it was unsigned by the applicant. There was also no signature of the officer effecting service upon the applicant. This showed that there was no proof of service by the Chairman on and due acknowledgment by the applicant as required under sub-reg. 5(1). This was therefore a breach of the said sub-reg. 5(1).

[13] It was also submitted that there were in existence two sets of Form 2 namely, exh. "AEM-2" and "MF-1" and there thus existed a contradiction which raised two inferences, the resulting benefit of which must be resolved in the applicant's favour.

[14] The respondent by way of response submitted that sub-reg. 5(1) uses the phrase "and shall cause a notice in Form 2 of the Schedule to be served ..." which meant that it was sufficient for there to be caused the notice in Form 2 to be served. They referred to exh. "MF1" which clearly shows proof of service by Mohd Fadzil bin Razali.

[15] They further submitted that exh. "AEM2" is a copy of Form 2 issued by the Advisory Board and sent to the Pusat Permulihan Khas (PPK) at Pokok Sena in Kedah to be served on the applicant. Therefore exh. "AEM2" obviously will not contain proof or service on the applicant as at that point of time it had yet to be served.

[16] Further, they submitted that it is evident from the affidavit of the Secretary to the Advisory Board that the applicant had in fact attended all three (3) representation proceedings without fail. This proved that the applicant was served and informed accordingly.

Findings

[17] Upon a consideration of the submissions by both parties, I agree with the submission of the respondent that the reason there apparently appears two sets of Form 2 is that one set is the copy issued by the Advisory Board and sent to the PPK at Pokok Sena "to be served" on the applicant ie, "AEM2" while the other shows the copy already received by the applicant ie, "MF1".

[18] Therefore, obviously the former document will not contain any proof of service while the latter does. Elementary reasoning would show that the two sets of documents referred to are shown at different points of time. There is therefore no ambiguity or contradiction in this regard. In any event, the attendance of the applicant at all the three representative proceedings would also resolve this point against the applicant.

[19] In respect of who ought to effect the service upon the applicant, I find that there is no necessity for the chairman to effect service as the words used are "shall cause a notice in Form 2 of the Schedule to be served on the detained person". The requirement of the sub-regulation is thus effective as long as the Form 2 is served upon the applicant even if not by the Chairman himself. I therefore find no merit in the submission raised by the applicant in respect of this issue.

(b) Contradiction Between exh. "AEM-2" (In The Affidavit Of Ahmad Edi Merican) And exh. "MF-1" (In The Affidavit Of Inspector Md Fadzil)

[20] This issue has already been addressed and dealt with in (a) above. Both exhibits display their respective contents at different points in time. Exhibit "AEM2" shows Form 2 before it was served on the applicant while exh. "MF1" shows Form 2 after service on the applicant. No contradiction as alleged therefore exists and this issue raised by the applicant is accordingly without merit.

(c) Failure To Comply With Sub-reg. 11(1) Prevention Of Crime (Advisory Board Procedure) Regulations 2014 And art. 151(1)(b) Federal Constitution

Sub-reg. 11 reads:

11. Report of Advisory Board

(1) Whenever any detained person makes representations under these Regulations to the Advisory Board, the Advisory Board shall, within three months from the date of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow, consider the representations and make recommendations to the Yang di-Pertuan Agong.

(2) Upon considering the recommendations of the Advisory Board under this regulation, the Yang di-Pertuan Agong may give the Board such directions as he thinks fit regarding the order made by the Board and every decision of the Yang di-Pertuan Agong shall be final and shall not be questioned in any court.

Article 151 of the Federal Constitution reads:

151. Restrictions on preventive detention

(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:

(b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph *(a)* and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.

[21] The applicant contends that from a combination of the above sub-regulation and Article, it is clear that a person cannot be detained beyond three months from the date of the receipt of representations by the Advisory Board and the said Advisory Board must hear the representations of the detainee and send its recommendations to the Yang di-Pertuan Agung (YDPA) within that period.

[22] They said that this meant that a person can be detained for a period of not more than three months but any subsequent detention beyond this must involve the intervention of the Advisory Board.

[23] The applicant submits that there was non-compliance with the above in the applicant's case.

[24] They submitted further that in respect of detention after the end of the first three month period, this would depend on the instructions of the YDPA after considering the recommendations of the Advisory Board on whether to cancel, suspend, or order that the detention order be continued.

[25] The affidavit of Ahmad Edi Merican merely avers that on 22 October 2015, the YDPA had agreed to the recommendations of the Advisory Board but did not state with clarity what it was that was agreed and whether the directions given were to cancel the detention order, or to suspend the detention order or to order that it be continued.

[26] This, it was submitted was important as at the end of the three month detention period, there must be an intervention by the Advisory Board and their recommendations must be confirmed by the YDPA and in the event the YDPA instructs that the detention order ceases or is suspended, the continued detention of the applicant is unlawful.

[27] It was also contended that it was mandatory to disclose after the Advisory Board's recommendations were sent to the YDPA, what the YDPA's instructions were.

[28] The respondent's submitted that based upon sub-reg. 11(1) of the Prevention of Crime (Advisory Board Procedure) Regulations 2014 and art. 151(1)(b) of the Federal Constitution, it was clear that the Advisory Board must consider the recommendations of the applicant within three months from the date of the receipt of the applicant's representations.

[29] They alluded to the affidavit of the Secretary of the Advisory Board which stated that the representation form was received on 14 July 2015 and the representation heard by the Advisory Board on 8 October 2015 at PPK Pokok Sena. Then on 12 October 2015, the Advisory Board made a recommendation to the YDPA and on 22 October 2015 the YDPA assented to the recommendation made by the Advisory Board.

[30] Therefore, the respondent submitted that the applicant was mistaken when he contended that he could not be detained for more than three months from the date of the order and that detention after three months requires the intervention of the Advisory Board after the completion of the first three months.

[31] What was meant by the three month period is that it is a period within which the Advisory Board must hear the representations of the applicant and make its recommendations to the YDPA within three months from the date of receipt of the applicant's representation form.

[32] The respondent's submitted that what was meant by the three month period under sub-reg. 11(1) was that it commences from the date of the receipt of the representation form ie, from 14 July 2015 until it is sent for consideration of the YDPA on 12 October 2015.

[33] Based on the affidavit filed, sub-reg. 11(1) was complied with. The three month period does not start from the date of the detention but from the date of receipt of Form 1 until the recommendation is sent to the YDPA. There is also no requirement that stipulates when the YDPA has to assent to the recommendations of the Advisory Board.

Findings

[34] Upon a consideration of the submissions advanced and upon a reading of the sub-rule and said Article, it is evident that the three month period does not commence from the date of the detention. The three month period commences instead from the date of receipt of Form 1 until it is sent to the YDPA. There is further no stipulation as to when the YDPA has to consider the recommendation of the Board of Advisors.

[35] With respect to the contention by the applicant that it was mandatory for the respondent's to state what were the findings or instructions of the YDPA in relation to the recommendation put up by the Board, I agree with the submission of the respondent that there was no necessity under any law obliging them to do so.

[36] Further s. 21A of the Act states as follows:

> 21A. Disclosure of information
>
> Nothing in this Act or in any regulations made under this Act shall require the Board, any member of the Board, any Inquiry Officer or any public servant to disclose facts or to produce documents which he considers:
>
> (a) to be against the public interest to disclose or produce;

[37] Article 151 of the Federal Constitution further stipulates as follows:

> 151. Restrictions on preventive detention
>
> (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:
>
> (3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

[38] It is therefore clear that there is no merit to the applicant's contention that it was mandatory for the respondent's to state what were the findings or instructions of the YDPA in relation to the recommendation put up by the Board.

(d) Failure To Comply With s. 12(1) Of The Prevention Of Crime Act 1959

[39] The applicant submitted that the failure of the inquiry officer ("IO") to report to the Registrar that there are reasonable grounds for believing that the applicant was a member of any of the registrable categories had occasioned a breach of s. 12(1) of the Act.

[40] The applicant's counsel advocated a literal translation of the said sub-section and submitted therefore that besides the IO, no one else or any third party may so report as it would amount to hearsay in the event.

[41] In the present case, submitted the applicant, it was disclosed in the affidavit filed by the respondent's that the Registrar was informed not by the IO but by the Prevention of Crime Board that there are reasonable grounds for believing that the applicant was a member of any of the registrable categories.

[42] It was thus contended that this was hearsay and not in compliance with the provisions of s. 12(1) of the Act.

[43] The respondent's on the other hand, submitted that the term "reported" under s. 12(1)(a) does not mean that the IO must report to the Registrar. They instead contend that the word "reported" refers to a report sent by the IO to the Prevention of Crime Board in accordance with s. 10(2) of the Act.

Findings

[44] Section 12 of the Act reads as follows:

> 12. Registration of persons believed to be members of any of the registrable categories
>
> (1) The Registrar shall keep a Register for the purposes of this Act, in which shall be entered the name of every person —
>
> (a) **who is reported by an Inquiry Officer** to be a person in respect of whom there are reasonable grounds for believing that he is a member of any of the registrable categories; and
>
> (b) who has not requested any review under section 11, or in respect of whom the Board has confirmed the finding made under subsection 10(2) or made or confirmed the decision under paragraph 10(3)(b),
>
> together with such other particulars as may be prescribed. (emphasis added)

Section 10(2) of the Act reads:

> 10. Report of Inquiry Officer
>
> (2) If the Inquiry Officer is satisfied that there are reasonable grounds for believing that the person who was the subject of the inquiry is a member of any of the registrable categories, he shall report the grounds, together with his finding, to the Board, and shall forward a copy of his finding to the officer having custody of the person, who shall forthwith serve a copy of the finding of the Inquiry Officer on that person.

[45] Upon a perusal of the above provisions, the phrase "reported" refers to a full report which is that sent by the IO to the Prevention of Crime Board in accordance with s. 10(2) of the Act. The Registrar therefore is required to register the name of a person who is reported by the IO to the Prevention of Crime Board under s. 10(2).

[46] This finding would also be in accord with the wordings in sub-s. 12(1)(b) as it is clear that registration of the person can only be done after taking into account whether such person has chosen to avail himself of the right to a review.

[47] As it is the Prevention of Crime Board who conducts the review, it is the said Board therefore who obviously possesses the relevant information with respect to the review. In this instance, the applicant had requested for a review. Therefore it was only the said Board which had the necessary information and was the only logical party that could have divulged such information in its report which had confirmed the findings of the IO to the Registrar.

[48] There was therefore no merit to the submission of the applicant on this issue.

(e) Failure To Comply With s. 11(2) Of The Prevention Of Crime Act 1959

[49] The applicant submitted that the wordings employed under s. 11(2) namely, "after considering the advice of a law officer thereon" meant that the non-disclosure of the identity of the said "law officer" as well as the absence of anything to show that the Prevention of Crime Board had requested for his or her advice before the said Board had confirmed the findings of the IO was fatal to the respondent's case. Further, it was also contended that the said Board had not held a review in contravention of s. 11 of the Act.

[50] The respondent by way of reply referred to the Interpretation Acts 1948 and 1967 which state *inter alia* that "law officers" is defined as follows "means persons for the time being holding the offices of Attorney-General and Solicitor-General respectively; …"

[51] They further submitted that at no time previously did the applicant raise the issue that the advice of the law officer was never received by the Board and therefore this can be regarded as a mere statement made from the Bar table.

[52] With regard to the allegation that the Board had not held a review under s. 11, it was submitted that this was a mere "bare allegation" without sufficient basis as on the affidavit filed, it was clear that such a review was held.

Findings

[53] In respect of the contention that the Board had not held a review, it is evident from the contents of the affidavit affirmed on 22 February 2016 by Dato' Ahmad Kamal who was the Chairman of the Board, that there was a review held on 1 July 2015 at 1.30pm and after the Board's review, the findings of the IO were confirmed under s. 10(2) of the Act.

[54] In respect of the argument regarding the identity and qualifications of the "law officer", the relevant portion of s. 11 reads:

> 11. Review by the Board of decision of Inquiry Officer
>
> (2) The Board shall, upon making any review under subsection (1), and after considering the advice of a law officer thereon:
>
> ...

[55] There appears nothing in the section or the Act that appears to define the expression 'law officer'. It is equally clear that there is nothing to also indicate that the identity and qualifications of the law officer needs to be disclosed.

[56] Further, at no time prior to this did the applicant raise the issue of whether the advice of the "law officer" had been received by the Board.

[57] I therefore find no merit in the submissions advanced by the applicant in respect of this issue.

(f) Non-compliance With s. 10(3)(b) And s. 10(4) Of The Prevention Of Crime Act 1959

[58] The applicant also alleged non-compliance of s. 10(3)(b) and s. 10(4) of the Prevention of Crime Act 1959. Section 10 reads as follows:

> 10. Report of Inquiry Officer
>
> (1) If the Inquiry Officer is satisfied that there are no sufficient grounds for believing that the person who was the subject of the inquiry is a member of any of the registrable categories, he shall report his finding, together with his reasons for it, to the Board, and shall forward a copy of his finding to the officer having custody of the person, who shall forthwith serve a copy of the finding of the Inquiry Officer on that person.
>
> (2) If the Inquiry Officer is satisfied that there are reasonable grounds for believing that the person who was the subject of the inquiry is a member of any of the registrable categories, he shall report the grounds, together with his finding, to the Board, and shall forward a copy of his finding to the officer having custody of the person, who shall forthwith serve a copy of the finding of the Inquiry Officer on that person.
>
> (3) Whenever the Board, after considering the finding of the Inquiry Officer submitted under subsection (1), is satisfied with respect to any person that:
>
> (a) there are no sufficient grounds for believing that the person is a member of any of the registrable categories, the Board shall forthwith direct any person having the custody of that person, within twenty-four hours of the receipt of the direction, to produce the person before a Sessions Court Judge, who shall thereupon discharge the order of

remand made under section 4 and, if there are no other grounds on which the person is lawfully detained, shall order his immediate release;

(b) based on the Inquiry Officer's finding there are sufficient grounds for believing that the person is a member of any of the registrable categories, the Board shall proceed in accordance with Parts III, IV and IVa of this Act.

(4) If the Board makes a decision under paragraph (3)(b), it shall forward a copy of its decision to the officer having custody of the person, who shall forthwith serve a copy of the decision of the Board on that person.

[59] The applicant in his affidavit affirmed on 1 February 2016, deposed in paras. 11 and 13 that he had at no time been served with the decision of the Board as made under s. 10(3)(b) of the Act.

[60] The applicant submitted that there had been no reply to these material averments and in accordance with trite law this was an acceptance of the said averments by the respondent's.

[61] The applicant submitted that as the respondent's had failed to prove that the decision of the Board made under s. 10(3)(b) was served on the applicant, this has occasioned a breach of s. 10(4) of the said Act.

[62] The applicant submitted that the provisions of s. 10(3)(b) mirrored the situation under s. 10(2) which concerns a situation where "… the inquiry officer is satisfied that there are reasonable grounds for believing that the person who was the subject of the inquiry is a member of any of the registrable categories ...", whereas s. 10(3)(a) on the other hand mirrored a situation under s. 10(1) where the inquiry officer was satisfied that there were no sufficient grounds for believing that the person is a member of any of the registrable categories.

[63] The applicant submitted therefore that s. 10(3)(b) was not only applicable to a situation under s. 10(1) but clearly applied as a whole and ought to be read together with s. 10(2).

[64] They went on to submit that it was a mandatory requirement that when the inquiry officer is satisfied that there are reasonable grounds for believing that the person is a member of any of the registrable categories, the Board ought to take steps under s. 10(4) and forward a copy of its decision to the officer having custody of the person, who shall forthwith serve a copy of the decision of the Board on that person.

[65] In support of their contention, the applicant placed reliance upon the cases of *Teow Leong Wooi lwn. Menteri Dalam Negeri, Malaysia & Yang Lain* [2015] 1 LNS 1213 and *Mugilan Monyarasu lwn. Menteri Dalam Negeri, Malaysia & Yang Lain* [2016] 1 CLJ 1026.

[66] The applicant also referred to the decision of this court in *Chow Mi Choi v. Pengerusi Lembaga Pencegahan Jenayah & Ors* [2016] 1 MLRH 586 where I had occasion to consider the provisions of s. 10 of the Act.

[67] The respondent on the other hand submitted that that there were two scenarios that arose when s. 10 was considered. They therefore contended that by submitting otherwise, the applicant had unwittingly misled the court. They accordingly submitted that there was no breach of sub-s. 3(b) and sub-s. 4 of the Act.

Findings

[68] In *Chow Mi Choi* (*supra*), I had rejected the submission advanced by learned counsel for the respondent which postulated a two scenario approach when reading the provisions of s. 10. This is what I had said in that case.

> [26] Upon the plain reading of the relevant provisions of the Act, it appears that in the case of a person whom there are reasonable grounds for believing is a member of any of the registrable categories, the appropriate chronology of steps to be taken are as follows.
>
> [27] Section 10(2) requires the inquiry officer who is satisfied that there are reasonable grounds for believing that the person who was the subject of the inquiry is a member of any of the registrable categories to report the grounds, together with his finding to the board, and shall forward a copy of his finding to the officer having custody of the person, who shall forthwith serve a copy of the finding of the inquiry officer on that person.
>
> [28] Next, s. 10(3) states that whenever the board, after considering the finding of the inquiry officer is satisfied that pursuant to s. 10(3)(b), based on the inquiry officer's findings there are sufficient grounds for believing that the person is a member of any of the registrable categories, the board shall proceed in accordance with Parts III, IV and IVA of the Act.
>
> [29] Following this, s. 11(2) requires the board, upon reviewing any decision or finding made under subsection 10(2) or decision under paragraph 10(3)(b) to either confirm the finding made under subsection 10(2) or decision under paragraph 10(3)(b) or reverse the finding or decision as the case may be.
>
> [30] As the applicant here did not request for a review, the provisions of s. 11 has no application. Therefore, the next step after 10(3)(b) in a case where there is no review is that the board shall proceed in accordance with Parts III, IV and IVA of the Act.

[69] At the time *Chow Mi Choi* was argued before this court, I had not had the benefit of the reasoning employed in the cases of *Mohamad Alif Salim lwn. Pengerusi, Lembaga Pencegahan Jenayah & Yang Lain* [2015] 1 LNS 1346; [2016] AMEJ 0813 (PJK No. 44-14-07-2015) and *Tirthadeva Sivan Premkumar v. Pengerusi Lembaga Pencegahan Jenayah Malaysia & Ors* [2016] 5 CLJ 1007; [2016] 3 AMR 609. Both cases decided by my learned brothers,

Hashim Hamzah J and Dr Choo Kah Sing JC respectively at the High Court in Alor Setar, took the position that there are two scenarios that feature when the provisions of s. 10 are considered.

[70] My learned brother Dr Choo Kah Sing JC had in *Tirthadeva Sivan Premkumar* (*supra*), also taken the position that there exists what was referred to as positive and negative findings when considering the provisions of s. 10. Indeed this was also the position adopted by the learned Senior Federal Counsel in the instant case before me.

[71] Perhaps a clearer understanding of the position adopted by both my aforementioned learned brothers can best be appreciated by the material portions from the case of *Tirthadeva Sivan Premkumar* (*supra*) as follows:

> [18] Section 10(4) of the Act states with precision that the a board's decision has to be served to the person in question, if the board's decision is made pursuant to s. 10(3)(b) of the Act.
>
> [19] As far as the reading and interpretation of s. 10(4) of the Act are concerned, this court fully agreed with the applicant's counsel that a copy of the board's decision had to be served to the person in question, if the board's decision is made pursuant to s. 10(3)(b) of the Act.
>
> [20] Unfortunately, in this instant case, the board's decision was not made under s. 10(3)(b) of the Act. The board's decision was made under s. 11(2)(a) of the Act, and it will be explained below as to why it was made under that section.
>
> [21] To begin with, s. 10(3)(b) must be read in light with s. 10(1) of the Act. This is so because s. 10(3) begins with the following wording:
>
> > 10(3) Whenever the Board, after considering the finding of the Inquiry Officer submitted under subsection (1), is satisfied with respect to any person that …
>
> [22] And, subsection (1) which is referred to in s. 10(3) reads as follows:
>
> > 10(1) If the Inquiry Officer is satisfied that there are no sufficient grounds for believing that the person who was the subject of the inquiry is a member of any of the registrable categories, he shall report his finding, together with his reasons for it, to the Board, and shall forward a copy of his finding to the officer having custody of the person, who shall forthwith serve a copy of the finding of the Inquiry Officer on that person.
>
> [23] Section 10(1) of the Act envisages a negative finding by the inquiry officer. Section 10(3) makes specific reference to a negative finding made pursuant to s. 10(1). It follows that s. 10(3)(a) and (b) apply in a situation where there is a negative finding made by the inquiry officer.
>
> [24] There are two scenarios which could happen when the board reviews a negative finding by the inquiry officer.

[25] The first scenario is envisaged in s. 10(3)(a). This is when the board, after having considered the negative finding, finds there are no sufficient grounds for believing that the person is a member of any of the registrable categories. In other words, the board confirms the negative finding. The person concerned shall be released.

[26] The second scenario is envisaged in s. 10(3)(b). This is when the board after having considered the negative finding, finds there are sufficient grounds for believing that the person is a member of any of the registrable categories. In other words, the board could not agree with the negative finding by the inquiry officer. The negative finding has now become a positive finding by the board.

[27] If the board reverses a negative finding, and makes a positive finding pursuant to s. 10(3)(b), it follows that a copy of the decision of the board's positive finding shall be delivered to the person concerned. This is required under s. 10(4) of the Act.

[28] The serving of a copy of the board's positive finding to the person concerned is a mandatory procedural requirement. This is because the person concerned is now given an opportunity to seek the board to review its own decision for the second time. In other words, it is to seek the board to reconsider its positive finding after the inquiry officer had first made a negative finding.

[29] The above interpretation of the entire s. 10 of the Act could be bolstered by referring to s. 11 of the Act, where it states as follows:

Section 11

(1) Any person who was the subject of an inquiry who is dissatisfied with any finding made under subsection 10(2) or decision under paragraph 10(3)(b) may within fourteen days of the service thereunder of the copy of the finding or decision on him by notice in writing request the Board to review the finding or decision.

(2) The Board shall, upon making any review under subsection (1), and after considering the advice of a law officer thereon:

(a) confirm the finding made under subsection 10(2) or decision under paragraph 10(3)(b) or

(b) reverse the finding or decision:

Provided that if the Board reverses any such finding or decision, and the person who made the request is still in custody, the Board shall within twenty-four hours of its decision direct the person to be taken before a Sessions Court Judge, who shall thereupon discharge the order of remand and, if there are no other grounds on which the person is lawfully detained, shall order his immediate release.

[30] Section 10(2) of the Act envisages a situation involving a positive finding of the inquiry officer right from the beginning; whereas, s. 10(3)(b) envisages a situation where the negative finding of the inquiry officer has turned into a positive finding, which is a decision made by the board.

A [31] Parliament had used the term "finding" in reference to s. 10(2); and the term "decision" in reference to s. 10(3)(b). Clearly, there is a distinction between "finding made under subsection 10(2)" and a "decision under paragraph 10(3)(b)". The former refers to the positive finding made by the inquiry officer; whereas, the latter refers to a decision made by the board, ie, a decision to reverse a negative finding and make
B a positive finding.

[32] In either of the situations above, the person concerned shall be served with a copy of the report or decision of the positive finding, together with a Borang I. This requirement is stated clearly in s. 10(2) and (4) of the Act, whichever is applicable.

C [33] The Borang I is for the person concerned, within 14 days upon receipt of the inquiry officer's report or the board's decision of a positive finding, to seek the board to review the positive finding under s. 11 of the Act. Section 11(1) of the Act has encapsulated these two situations clearly.

D [34] Coming back to the facts of this instant case, the IO's finding was a positive finding right from the beginning. Hence, the positive finding was made pursuant to s. 10(2) of the Act; it was not made pursuant to s. 10(3)(b) of the Act as submitted by the applicant's counsel.

[35] On May 13, 2015, a copy of the IO's report was served to the
E applicant notifying him of the positive finding, *viz.* pursuant to s. 10(2) of the Act. The applicant was also served with a Borang I. The applicant elected not to seek the board to review the positive finding of the IO. He was satisfied with the positive finding of the IO.

[36] On June 1, 2015, the board convened a meeting to review the
F positive finding of the IO, even though the applicant did not seek the board to review the positive finding of the IO. The board took upon itself to review the positive finding of the IO, after having receipt from the IO the report and his findings.

[37] The review by the board of the IO's positive finding was not made pursuant to s. 10(3)(b) of the Act.

G [38] The board's finding and confirming the IO's positive finding was in fact an exercise carried out pursuant to s. 11(2)(a) of the Act.

[39] Section 11(2)(a) of the Act states as follows:

(2) The Board shall, upon making any review under subsection (1), and
H after considering the advice of a law officer thereon:

(a) confirm the finding made under subsection 10(2) or decision under paragraph 10(3)(b); or …

[40] Undoubtedly, the board's confirmation of the IO's positive finding was not made pursuant to s. 10(3)(b) of the Act. The board's confirmation
I of the IO's positive finding was made under s. 11(2)(a) of the Act. Hence, the mandatory requirement to serve a copy of the board's decision to the applicant as stated in s. 10(4) of the Act is not relevant.

[41] The argument raised by the applicant's counsel that the failure of the board to serve its decision to the applicant is fatal because it is mandatory pursuant to s. 10(4) of the Act was misconceived on this given set of facts in this instant case.

[42] I observed that the applicant's counsel has misread the provision of s. 10(3)(a) of Act. The applicant's counsel took the view that s. 10(3)(a) of the Act referred to a situation where the board confirmed the inquiry officer's positive finding pursuant to s. 10(2) of the Act. I could not agree with the applicant's counsel's reading of the provision.

[43] Section 10(3)(b) is a subsection of s. 10(3), where s. 10(3) clearly refers to the inquiry officer's negative finding under s. 10(1), not a positive finding under s. 10(2) of the Act.

[44] Sections 10(3) (a) and 10(3) (b) have to be read within the context stated in s. 10(1) of the Act, i.e. a negative finding of the inquiry officer. In an unreported case of *Mohamad Alif b Salim v. Pengerusi, Lembaga Pencegahan Jenayah & 3 Ors* [2016] AMEJ 0813 (PJK No. 44-14-07/2015), paragraphs 36 to 41, wherein the learned High Court judge of Alor Setar, Kedah, also made a similar finding that s. 10(3)(b) has to be read in the context of a negative finding, ie, a negative finding pursuant to s. 10(1) of the Act.

[72] The pivotal point gathered from the reasoning adopted above seems to be the emphasis upon the phrase "under sub-s. (1) ..."employed in sub-s. (3) to s. 10. This would make the provisions of sub-s. (3) dependent upon the situation envisaged in sub-s. (1) which postulates a negative finding ie, that the inquiry officer is satisfied that there are "no sufficient grounds" for believing that the person who was the subject of the inquiry is a member of any of the registrable categories.

[73] It would also appear from the judgment in *Tirthadeva Sivan Premkumar*, that the provisions of sub-s. (3) relate to the stage where the Board is engaged in the process of considering the findings of the inquiry officer under sub-s. 1 and it is here that it is contended that there exists two scenarios.

[74] The first is that envisaged in s. 10(3)(a) which is when the Board, after having considered the negative finding, finds that there are no sufficient grounds for believing that the person is a member of any of the registrable categories. This relates therefore to a situation where the Board after having considered the findings of the inquiry officer, confirms the negative finding by the inquiry officer in which case the person shall be released immediately.

[75] The second scenario contended for is that envisaged in s. 10(3)(b) which is where the Board after having considered the negative finding, now finds that there are sufficient grounds for believing that the person is a member of any of the registrable categories. This means that the Board does not agree with the negative finding made by the inquiry officer in which case it then converts the negative finding to a positive finding.

[76] In circumstances where the Board converts the previously negative finding into a positive finding pursuant to s. 10(3)(b), it then follows that the provisions of sub-s. (4) become applicable in which case a copy of the decision of the Board's converted and now positive finding shall be delivered to the person concerned. It would appear that the purpose of serving a copy of the Board's now positive finding on the person concerned is so as to enable him to seek a review of the Board in order to reconsider its decision to convert the previously negative finding by the inquiry officer to a positive finding.

[77] In order to further fortify the position aforesaid, the decision in *Tirthadeva Sivan Premkumar* also pointed out the distinction between the word "finding" in relation to the inquiry officer, employed in sub-s. 10(2) and the word "decision" in sub-s. (4) in relation to the Board. The former, it was opined, referred to a positive finding by the inquiry officer whereas the latter referred to a decision made by the Board to convert a previously negative finding to a positive finding.

[78] It would appear therefore that where the finding of the inquiry officer involves a positive finding right from the beginning, as was the case here, such positive finding being made under s. 10(2) and not under s. 10(3)(b), the requirements of sub-s. (4) are inapplicable. It appears also that the act of the Board in finding and thereafter confirming the inquiry officer's positive finding was an exercise which was done pursuant to s. 11(2)(a) of the Act instead. The said s. 11(2)(a) reads:

> 11. Review by the Board of decision of Inquiry Officer
>
> (2) The Board shall, upon making any review under subsection (1), and after considering the advice of a law officer thereon:
>
> (a) confirm the finding made under subsection 10(2) or decision under paragraph 10(3)(b)

[79] To reiterate, since the Board's confirmation of the positive finding by the inquiry officer was not made pursuant to s. 10(3)(b) but rather pursuant to s. 11(2)(a) of the Act, the mandatory requirement to serve a copy of the Board's decision on the applicant pursuant to sub-s. (4) to s. 10 was not relevant.

[80] I have read and re-read s. 10 of the Act in its entirety countless times. After careful, anxious and might I add, prolonged consideration of the stand taken in the cases above cited, I am constrained to make a departure from what was previously held in *Chow Mi Choi* in respect of the interpretation of sub-s. 10(3) (*supra*).

[81] Upon a reading of the s. 10(3), I find that the wordings employed in the opening of that section namely, "Whenever the Board, after considering the finding of the inquiry officer submitted under sub-s. (1), is satisfied ...", upon a plain reading and in its ordinary sense envisages a situation where

there is a negative finding under sub-s. (1) and not a situation under sub-s. (2) which relates to a positive finding from the very commencement, made by the inquiry officer. In that situation, the provision of sub-s. (4) has no application.

[82] To put it another way, the provisions of sub-s. 3(b) and sub-s. (4) only applies in a situation where the Board converts a negative finding to a positive finding. This was obviously not the case here.

[83] I therefore find no merit in the contention by the applicant that there has been non-compliance with the provisions of sub-s. (4).

[84] For the reasons given above, I dismissed the applicant's application.